Intelligence Constraints of the 1970s and Domestic Terrorism

Executive Summary

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Rand

Report Documentation Page

Form Approved
OMB No. 0704-0188

1. REPORT DATE	2. REPORT TYPE	3. DATES COVERED
DEC 1982		**00-00-1982 to 00-00-1982**

4. TITLE AND SUBTITLE	5a. CONTRACT NUMBER
Intelligence Constraints if the 1970s and Domestic Terrorism. Executive Summary	5b. GRANT NUMBER
	5c. PROGRAM ELEMENT NUMBER
6. AUTHOR(S)	5d. PROJECT NUMBER
	5e. TASK NUMBER
	5f. WORK UNIT NUMBER
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) **Rand Corporation,1776 Main Street,PO Box 2138,Santa Monica,CA,90407-2138**	8. PERFORMING ORGANIZATION REPORT NUMBER
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)	10. SPONSOR/MONITOR'S ACRONYM(S)
	11. SPONSOR/MONITOR'S REPORT NUMBER(S)

12. DISTRIBUTION/AVAILABILITY STATEMENT
Approved for public release; distribution unlimited

13. SUPPLEMENTARY NOTES

14. ABSTRACT

15. SUBJECT TERMS

16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES	19a. NAME OF RESPONSIBLE PERSON
a. REPORT	b. ABSTRACT	c. THIS PAGE			
unclassified	**unclassified**	**unclassified**	**Same as Report (SAR)**	**32**	

Prepared under Grant Number [illegible] from the
Department of Justice.

ISBN 0-8330-0539-1

Published by The Rand Corporation

R-2939-DOJ

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Prepared for
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Rand
SANTA MONICA, CA. 90406

PREFACE

This report summarizes the conclusions of a study of constraints on intelligence activities in the investigation of terrorist or terrorist-related crimes in the United States. The study addresses the question, To what extent did the post-Watergate intelligence "rules" affect law enforcement's ability to investigate and prosecute cases of domestic terrorism?

Specifically, the study compares and contrasts the investigation of domestic terrorism and the prosecution of alleged terrorists during the period before 1975, when the regulations governing such intelligence activities were more flexible, and during the period from 1975 to 1980 when constraints were greatly increased. This portion of the study is reported in a companion Rand Note, *Intelligence Constraints of the 1970s and Domestic Terrorism: Vol. I, Effects on the Incidence, Investigation, and Prosecution of Terrorist Activity*, N-1901-DOJ, by Sorrel Wildhorn, Brian Michael Jenkins, and Marvin M. Lavin, December 1982.

In the course of the study, we also assembled and summarized a selected sample of legal, legislative, and administrative constraints at the local, state, and federal levels on the collection, maintenance, use, and dissemination of information pertaining to domestic security matters. That survey is reported in Rand Note N-1902-DOJ, *Intelligence Constraints of the 1970s and Domestic Terrorism: Vol. II, A Survey of Legal, Legislative, and Administrative Constraints*, by Marvin M. Lavin, December 1982.

Since the completion of this study, significant changes have been made in federal executive orders and departmental guidelines, and in local police department guidelines. For example, on December 4, 1981, after the study was completed, President Reagan issued Executive Order No. 12333 on United States Intelligence Activities, which liberalizes authority to assist and cooperate with state and local law-enforcement agencies. The study does not address the regulatory changes or cases prosecuted after 1980.

Numerous obstacles and delays were encountered in the course of this research, evidence of the sensitivity of the subject matter. The research was initially approved by the National Security Council/ Special Coordinating Committee Working Group on Terrorism and funded by the Law Enforcement Assistance Administration (LEAA) of the Department of Justice. Soon after the study was initiated, however,

a separate office in the Department of Justice contemplated withdrawing the grant because the Federal Bureau of Investigation took the position that, although a member of the Working Group on Terrorism, it had not formally approved the project. This internal dispute resulted in months of uncertainty. Ultimately the grant was not withdrawn, but the Bureau decided not to cooperate formally in the study. Informally, FBI officials, both active and retired, were of great assistance.

Several of the police departments whose assistance we sought were involved in lawsuits directed at their intelligence operations, causing further delays. For this reason, for example, we could not directly interview members of the Chicago Police Department. The Los Angeles Police Department's Public Disorder Intelligence Division (PDID) was also named in a civil suit; several officers were the object of an investigation by the Department's Internal Affairs unit. Finally, differences within Rand over how to interpret the data we did gather caused several revisions and still further delays.

Although the rules keep changing, this summary and the two accompanying volumes should be of interest to local, state, and federal government officials concerned with domestic terrorism. They should be particularly useful for officials in law enforcement, prosecution, and the judiciary who are responsible for the difficult tasks of investigating, prosecuting, and adjudicating cases of domestic terrorism.

ACKNOWLEDGMENTS

We owe a special thanks to Mr. Perry Rivkind, Assistant Administrator of Operations Support, Office of Operations Support, Law Enforcement Assistance Administration, for his support in initiating the research and his continued support of the effort, sometimes in the face of considerable bureaucratic resistance.

This study could not have been done without the cooperation of our interviewees—current and former law-enforcement and prosecution officials who have direct knowledge of the cases reported herein. Given the nature of the material contained in this report, it seems prudent to preserve their anonymity. But we wish to acknowledge their current or past agency affiliations. In some cases we sought and received active and formal cooperation from these agencies; in others we received informal cooperation from specific individuals. The agency affiliations are the Cook County, Illinois, State Attorney's Office; Dade County, Florida, Public Safety Department; Dade County State Attorney's Office; Miami Police Department; Los Angeles Police Department; Los Angeles County District Attorney's Office; New York City Police Department; Manhattan District Attorney's Office; San Francisco Police Department; San Francisco District Attorney's Office; and the U.S. Attorney's Offices in Chicago and Miami.

Although the Federal Bureau of Investigation opted not to cooperate formally in our study, we were able to interview three former officials and Special Agents, to whom we are indebted.

We also wish to acknowledge the assistance of Rand staff members William Harris, Konrad Kellen, D. M. Landi, and Willis Ware, who reviewed earlier drafts of this report and offered many helpful comments and suggestions.

We are greatly indebted to Janet DeLand for her patience, diligence, and skill in the seemingly never-ending task of editing the numerous revisions of this report.

And finally, we wish to mention Alyce Raphael and Bernadine Siuda, our secretaries, whose dedication and hard work we always rely upon and too often take for granted.

INTELLIGENCE CONSTRAINTS OF THE 1970s AND DOMESTIC TERRORISM: EXECUTIVE SUMMARY

Following the revelations of abuses by government agencies in intelligence collection during the civil rights and anti-war movements of the 1960s and the crimes and excesses that came to light in the Watergate scandal, more stringent controls and limitations were placed on the intelligence operations of law-enforcement agencies at the federal, state, and local levels. These controls limited inquiry, surveillance, and the keeping of files on certain persons and organizations; established strict criteria for the use of intelligence gathering techniques; limited the time that information could be retained in government files; restricted the transfer of information from one government agency to another; compelled government agencies that maintain certain categories of information to routinely report what they have in their files, or to reveal it to the subject upon request; and established oversight groups and procedures to ensure compliance. The rules are set forth in federal legislation, executive orders, federal department, agency, and service directives, state legislation, local-level guidelines, and court rulings.

In the wake of criminal prosecution of government officials for illegal intelligence activities and the seemingly increasing likelihood of exposure to such activities, some senior and middle-level bureaucrats became cautious beyond the letter of the newer rules. There was a tendency on the part of law enforcement to react to *supposed* or *perceived* rather than actual constraints. The result was a precipitous decline in domestic security activity by law-enforcement agencies at all levels of government.

Law-enforcement officials complained that the newer rules on intelligence collection and retention seriously impaired their ability to anticipate possible terrorist incidents or to identify, locate, and apprehend persons engaged in politically motivated crimes. In 1977, Stuart Knight, Director of the U.S. Secret Service, testified before the Senate Subcommittee on Criminal Laws and Procedures that there had been a 50 to 60 percent decrease in the intelligence his agency was receiving, and that the qualitative degradation might constitute an additional 25 percent reduction.[1]

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[1] *The Erosion of Law Enforcement Intelligence and Its Impact on the Public Security*, Hearings Before the Subcommittee on Criminal Laws and Procedures, Senate Committee on the Judiciary, Part 1, 95th Congress, First Session, July 27, 1977.

In Congressional hearings in 1978,[2] law-enforcement officials testified that

- Informants had virtually disappeared because of freedom-of-information laws and related court decisions and restrictions.
- Intelligence was no longer freely shared among law-enforcement agencies despite the highly mobile nature of terrorist groups.
- Electronic surveillance was completely forbidden in 21 states and could be used only under extraordinary circumstances and pursuant to a court order in virtually all of the remaining states.
- Access to telephone records, bank records, and other third-party records by law-enforcement agencies generally required a court order, and some states required that the subject be notified.[3]
- Intelligence units at state and local levels had been disbanded or reduced to a level at which they were almost inoperable.
- Valuable intelligence files had been completely destroyed in some jurisdictions, impounded in others, and extensively purged in still others.

Did the rules of the 1970s impose unintended and unreasonable restrictions on intelligence activities, particularly in the area of terrorism and politically motivated crimes? While law-enforcement officials, prosecutors, and judges can provide information on how they perceive the effects of the newer rules, their perceptions alone do not provide empirical evidence for an objective impact assessment, and inevitably, personal interviews are seen as providing a biased picture. Therefore, we have combined interviews with law-enforcement officials with a relatively complete and representative sample of both older and more recent cases in which politically inspired crimes were prevented or prosecuted, from which we could draw quantitative conclusions.

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[2] *The Erosion of Law Enforcement Intelligence and Its Impact on the Public Security*, Report of the Subcommittee on Criminal Laws and Procedures to the Committee on the Judiciary, United States Senate, 95th Congress, Second Session, Washington, D.C., 1978.

[3] Even where state law does not mandate notification, many banks, telephone companies, and other private organizations holding third-party records notify the subject as a matter of policy.

Specifically, we wanted to see if the outcomes of the cases would have changed had other rules applied. How would successful investigations and prosecutions of older cases have fared under the newer rules? Would the outcomes of more recent cases that were not successful have been different had the investigations occurred in the old environment?

We identified cases of terrorist activity or other politically motivated crime, attempted to determine what, if any, intelligence-gathering techniques were employed by the investigators, and then applied the newer rules to older cases, and the older rules to the newer cases, to see if the outcomes would have been different. We were particularly interested in seeing how many successful[4] cases under the older rules would have been failures under the newer rules. Although the newer rules were imposed over a period of several years, we have taken 1974 as the break between the "old" environment and the "new."

This kind of quantitative analysis enables us to test the perceptions of the respondents we interviewed. More important, it provides an independent and objective means of assessing the impact of the newer rules.

The Interviewees

The officials we interviewed include current and former officials of federal and local law-enforcement and prosecution agencies who had intimate knowledge of terrorist-related conspiracies or acts. We particularly sought "old hands" whose first-hand experience spanned the entire period of interest (1965-1980), because their experience would enable them to make informal judgments about the impacts of the newer intelligence rules. We looked for service in, or direction of, police intelligence units or investigative units that dealt with terrorist-related incidents and crimes and prosecution of such crimes.

Because the radical and activist groups that have been responsible for the majority of terrorist incidents and crimes in the United States over the past 15 years have operated in and about large metropolitan areas, we focused our attention on the Los Angeles, San Francisco

[4] Cases in which law enforcement prevented or deterred crimes or in which the perpetrators of crimes were identified, arrested, and convicted.

and Oakland, New York, Chicago, and Miami Beach and Dade County areas. It has been estimated that 51 percent of all terrorist incidents in the United States in 1970-1980 took place in these five areas.[5] We were unable to interview officials from the Chicago and Miami Beach Police Departments because, for various reasons, they were unable to cooperate. But we did conduct interviews with current and past officials of the county prosecution agencies in these areas.

We attempted to obtain official cooperation from the FBI in collecting case summaries and in interviewing officials who had intimate knowledge of terrorist-related investigations in Los Angeles, San Francisco, and New York. However, after considerable delay, we were formally notified that the FBI would not officially cooperate. By this time, we had insufficient time or resources to return to these cities for interviews with *federal* prosecutors. We did, however, interview a few former FBI officials, who provided some insight, opinions, and details of a few cases.

The respondents agreed that the newer rules had hampered their effectiveness in preventing terrorist activity, investigating terrorist crimes, and prosecuting offenders. At the same time, they were not in agreement about the importance of this loss. Some asserted that there had been a significant decline in *preventive intelligence*, claiming that in the past, informants and undercover agents had penetrated groups likely to engage in violence, allowing police to prevent or at least minimize potential incidents. However, others observed that the 1960s and early 1970s—the heyday of police intelligence activity—were also the heyday of domestic terrorist activity, implying that intelligence efforts had not significantly reduced the level of terrorism and that the decline in intelligence operations since the mid-1970s had produced no corresponding increase in terrorist crimes.

Some of the interviewees, particularly prosecutors, pointed out that many of the serious terrorist-related crimes were never solved, and many of those that were solved produced insufficient evidence to prosecute.

The interviews led us to conclude that collecting intelligence about terrorist groups, even in an environment with few restrictions, is extremely difficult.

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[5] Data from a chronology of terrorist incidents maintained by Risks, International, Inc., Alexandria, Virginia.

Intelligence Files

What police know about individuals or groups resides in files, and the newer rules hit those files hard. During the 1970s, police intelligence files were purged repeatedly, and tighter rules for starting new files were imposed. Limitations were also placed on the kinds of information that could be kept in files, and the length of time the information could be kept.

Police intelligence files on political activities have always been much broader in scope than files pertaining to active criminal investigations. Prior to the implementation of the newer rules, files included information on known and suspected members of terrorist groups, their friends and associates, and suspected sympathizers. They included information on protest groups that might support the aims of terrorist groups, if not their methods, and might thus provide recruits. They also included information on groups that were not "subversive" but that might engage in major demonstrations. Possible criminal activity was not a prerequisite. One police officer said, "Some group says tomorrow it's going to have ten thousand members march on some diplomatic mission. That many people create a crowd control problem. Do we mobilize? We look at files and find the group has six members, so we don't get too excited."

In one police department we visited, files contained cards that went back to the 1940s and reflected the changing focus of police intelligence. They contained information on suspected Nazis, the concern of the 1940s; Communist Party membership rosters, the concern of the 1950s; Black militants, right-wing extremists, and anti-war demonstrators, the concern of the 1960s.

The purges of the files began in the 1970s as a result of fundamental changes in philosophy regarding police intelligence files. Law-enforcement officials believe that a growing number of critics perceived intelligence files as having sinister meanings in the 1970s. That attitude was manifested in stricter requirements. Files were limited more specifically to law-enforcement concerns. A well-articulated basis was required for starting a file—"perhaps less than a probability, but more than a possibility" of violent threats. The requirements applied to persons who could be investigated as well. Contact with someone under investigation was not enough to justify initiating a new investigation.

Some of the officials interviewed felt that purging the files caused no great loss, and that the old files were of little value anyway, having grown too large or unwieldy. Some even implied that with the volume reduced, the files were more useful. Other respondents took

the opposite view, arguing that under the newer rules, the files were of little utility.

Undercover Operations

Our respondents considered the use of undercover officers and informants to be the most important technique of prevention and investigation of terrorist activities. Law-enforcement agencies appear to have clear-cut preferences between informants and undercover officers. The New York police, for example, prefer to rely on undercover officers, because they "are in the organization, under control, and disciplined." (Undercover officers were employed in 9 of the 23 older rule cases we examined and in 7 of the 28 newer rule cases.) Protecting the identities of undercover officers is less difficult than shielding informant identities: When prosecutors are ready to go to court, the undercover officers simply surface. Undercover officers also make better witnesses than informants, whose background or motives for informing sometimes make them less credible in court.

Undercover officers are also used by the Miami, Los Angeles, and San Francisco Police Departments. San Francisco law-enforcement officials said that they had penetrated a number of groups, using both undercover officers and informants. The FBI, on the other hand, generally used informants as a matter of policy during the 1960s and 1970s.

All of the respondents asserted that undercover officers were being used far less now than they were prior to 1974. They noted that an officer cannot simply go undercover and penetrate a group overnight. It may take years to establish credentials, but the newer rules required greater probability of certain crimes being committed before infiltration could begin. At one time, an officer would have been put "in an area" even before any criminal activity had occurred in order to establish his credibility so that he could infiltrate a group if one emerged. One officer said that kind of thing could not be done today: "It would be viewed as fishing."

Changing attitudes toward intelligence operations in general, along with reductions in the resources available for such activities, further limit undercover operations. The five or even ten years required for an undercover officer to establish credentials and infiltrate a group represent a costly investment of manpower, and the investment may not be worth the sentences imposed even when convictions are obtained. A former FBI official noted, for example, that the light sentences imposed on the defendants in one case involving the

Weather Underground probably did not justify the four years and seven years spent by the two agents who infiltrated the group.

Although the respondents claimed a high degree of success in the use of undercover operations, they were also candid in discussing the difficulties. One police officer said, "To get undercover in the JDL [Jewish Defense League], you have to be 14 or 15 years old." A former FBI official reported, "In the forties, fifties, and sixties, we were dealing with large structured organizations. They had headquarters; people attended meetings. [Through such techniques as undercover operations, informants, and surreptitious entries], we could gain information." In the 1960s and 1970s, it became more difficult. The new groups "were small, they had no formal headquarters, they carried out acts of terrorism, they claimed credit by communique."

Informants

Informants appear to be the most commonly used means of keeping track of underground groups. Informants were employed in 13 of the 23 older rule cases we examined and in 7 of the 28 newer rule cases. Police and prosecutors in all five metropolitan areas cited cases in which informants had been used. The FBI made extensive use of informants. The Bureau's view was that an FBI agent is too valuable to put underground for a long time; one agent can run eight to ten informants. One local police official also pointed out that the strict entry requirements of the Bureau virtually precluded undercover operations: FBI agents were too easily spotted. Moreover, the Bureau is concerned that an agent left too long underground might incorporate the attitudes and lifestyle of his cover as his own.

It is more difficult to recruit informants in the political underground than in the criminal underground, particularly in ethnic communities such as the Cuban neighborhoods in Florida where anti-Castro Cuban terrorists have been able to count on a measure of popular support for their activities. "Revolutionaries" are not likely to run afoul of the law for minor infractions, few have criminal records, and they are generally not motivated by money; hence, they are not likely to become informants if arrested, although sometimes it does happen.

The fact that informants are not always reliable and often make poor witnesses was a minor concern when police intelligence was primarily directed toward deterrence, prevention, or disruption. Under the old rules, the planting of informants was particularly effective against the Ku Klux Klan. One retired FBI official recalled that fol-

lowing the murder of three civil rights workers in Mississippi, the FBI started "aggressively interviewing" every Klan member. Members were warned that while it was not illegal to belong to the Klan, if any trouble occurred, the FBI would go after them first. The FBI official admitted that many of these interviews were confrontations. "KKK members didn't like to be interviewed." But the practice served two objectives: First, showing Klansmen that the FBI knew they were members who could be promptly identified had a deterrent effect on their activities. Second, the aggressive interviewing program allowed the FBI to recruit additional informants among those members who were against violence or who simply wanted to avoid harassment.

Such aggressive interviewing would not be tolerated against any legal organization today, including the Klan. "Under current thinking," said a former FBI official, "such a program would be considered as an invasion of privacy." The prohibition of intelligence operations without an articulable likelihood of criminal activity virtually rules out the recruiting of informants among aboveground sympathizers or members of support groups.

The Freedom of Information Act (FOIA), several respondents asserted, makes recruiting informants more difficult even in situations where the newer rules would permit it. People believe that their identities cannot be protected, that criminal groups have, through FOIA requests, identified and eliminated informants. The reluctance to become an informant is based not so much on what the FOIA actually does, but rather on how it is perceived.

Our respondents argued that it has in fact become increasingly difficult to shield the identities of informants during prosecution, as a result of more liberal discovery laws. Law-enforcement officials, particularly in California, said that it is very difficult now "to make a case and not give up the informant." They cited several cases in which police claimed privilege in withholding the identity of an informant or information that could enable the defendants to figure out who the informant was, thereby compelling the prosecutors to drop the case.

It is difficult to assess how much these developments have reduced the flow of information from informants. Not all informants were genuine. One former FBI agent asserted that the Bureau's emphasis on informants had led to quotas—each agent had to recruit a certain number of informants within a specified time period. Other law-enforcement officials revealed that information that was claimed to have been developed using other investigative techniques was in fact often provided by informants. Acting on informants' information, the

detective would find other sources of corroborating evidence, on which he would then make the case.

Other Limiting Factors

Several respondents said that the FOIA had reduced—and in some cases virtually eliminated—the flow of information from local police departments to federal investigators. Police investigators also mentioned increased difficulty in obtaining permission for electronic surveillance.

Another problem results from the fact that investigations of terrorist groups may be treated as both domestic and foreign counterintelligence investigations. A former official in the U.S. Attorney's Office in Florida said that local investigations had been "frustrated by the foreign intelligence guidelines in obtaining information needed for the prosecution of Cuban terrorists." And a Los Angeles Police Department official said that it had been difficult to obtain information with which to compare local bombings by Croatian extremists with bombings by Croatian terrorists that had occurred outside of the country.

Many of the respondents also complained about the emergence of the so-called "cause lawyers," politically committed attorneys who specialized in the defense of persons accused of politically inspired crimes. The "cause lawyers" were seen as having been effective in shaping and exploiting the newer rules, and as having created a barrage of complaints and civil suits designed to harass, constrain, and ultimately dismantle all domestic intelligence activities.

Beyond the Rules

"Climate is extremely important," one former FBI official told us. Police intelligence activities do not pursue a course independent of public attitudes and political pressure. Public attitudes influence legislation, orders from the White House, and federal and local government departmental directives that determine the degree and direction of intelligence efforts.

The assassinations and riots of the 1960s provoked nationwide concern about the adequacy of domestic intelligence. Following the assassination of John F. Kennedy, the Warren Commission saw the need for more intelligence about defectors, malcontents, and others

who might threaten the life of the president.[6] The Eisenhower Commission, created after the assassination of Senator Robert Kennedy in 1968, recommended that "police departments throughout the nation improve their preparations for anticipating, preventing, and controlling group disorders."[7] Following the killing of four students by National Guardsmen at Kent State University in 1970, the Scranton Commission observed that "bombing and arson have increased alarmingly on campuses. This sort of covert and terrorist crime by individuals or small groups presents an extremely difficult police problem. . . . The problem . . . necessarily involves police in extensive intelligence-gathering activities."[8] The Scranton Commission report went on to say that "if the police are to do their job of law enforcement on the campus properly, they need accurate up-to-date information. Only if they are well-informed can the police know how and when to react and, equally important, when not to react."

As long as intelligence activities were directed against aliens or groups that had little community support, police intelligence activities were not closely questioned. But the civil rights movement and, to a greater extent, the anti-war movement introduced a different class of perpetrators, whose causes engendered widespread sympathy.

Exposés of abuses by the government further shifted public opinion. The Army was found to be maintaining files on anti-war activists, including elected officials. The FBI's COINTELPRO efforts were exposed as a proactive effort not merely to sow discord among self-proclaimed revolutionaries but also as a covert campaign to malign the reputations of legitimate civil rights leaders and sympathizers. The Watergate affair cast a long shadow over all domestic intelligence activities in the political area and contributed to the atmosphere that led to increased constraints.

Although all of the respondents remarked on this change in attitude, not all attributed it to political developments. One observer considered it simply part of the general trend toward increasing the rights of the accused and the convicted.

The changes in attitude and philosophy appear to have had as profound an effect on intelligence operations as did the newer rules

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[6] *Report of the President's Commission on the Assassination of President John F. Kennedy,* Chief Justice Earl Warren, Chairman, U.S. Government Printing Office, Washington, D.C., 1964, pp. 461-465.

[7] *To Establish Justice, to Insure Domestic Tranquility,* Final Report of the National Commission on the Causes and Prevention of Violence, Dr. Milton S. Eisenhower, Chairman, U.S. Government Printing Office, Washington, D.C., 1969, p. 275.

[8] *Campus Unrest,* Report of the President's Commission on Campus Unrest, William Scranton, Chairman, U.S. Government Printing Office, Washington, D.C., 1970, pp. 171-172.

themselves. A new atmosphere was created that had a "chilling effect" on police intelligence operations.

Because the rules were hastily drafted in many cases, they were often imprecise, subject to interpretation, complicated, contradictory, and hard to understand. One of our respondents remarked that you had to be a lawyer to interpret whether or not an intelligence operation was legal. Higher officials tended to interpret the rules conservatively. If a decision fell anywhere in a grey area, they vetoed it to be on the safe side. A former FBI official recalled that FBI headquarters was so uncertain about the legality of investigative techniques that it wanted to collapse the single successful undercover operation directed against the Weather Underground, even though the guidelines did not prohibit such operations.

Under the old rules, a wrong decision was handled administratively (within the law-enforcement agency). Under the newer rules, a wrong decision meant criminal prosecution. Even an operation approved by superiors might subsequently be ruled illegal, and the investigators would be prosecuted.

Uncertainty and fear provoked overreaction. Investigators no longer did things they were in fact allowed to do. An investigator described one example of what he thought could no longer be done under the newer rules. When we asked him how these newer rules would have actually affected the case in question, he discussed the issue with some colleagues and concluded that in fact nothing in the newer rules would have adversely affected either the investigation or the prosecution of the case.

Fearing bad publicity and possibly legal action, private companies that in the past had informally cooperated with investigators now demanded warrants. Police could no longer obtain easy or rapid access to telephone records, billing records, credit records, and bank records—information sources that had often been used to quickly track down suspects. This change was not the result of statutes or court decisions, said one New York prosecutor, but rather of policy changes by the corporations.

Getting warrants became more difficult. Judges required more evidence before granting authority for wiretaps or surveillance operations. Prosecutors, too, were sensitive to the shifts in public attitudes. Some District Attorneys became reluctant to prosecute political cases. At a minimum, they wanted more evidence before going to court. Some police officers complained that the city would not assign its own attorneys to defend police on spying charges. Police intelligence had become unpopular.

Almost every department we talked to was in the midst of lawsuits concerning police intelligence operations in political cases. In fact, a

lawsuit in progress prevented us from interviewing officials of the Chicago Police Department.[9] Police commissions and police chiefs felt that intelligence operations only brought lawsuits. Budgets for intelligence operations were cut, operations were reduced, and the little intelligence they did produce was judged not worth the effort.

Getting Around the Restrictions

Organizations that see restrictions or requirements as unreasonably constraining often find ways of getting around them. To avoid tight restrictions on police intelligence files and the loss of information when files are purged, investigators have created "soft files" that are outside the official police files. These may be carried in an investigator's notebook, in the trunk of a car, or even in a home computer.

To avoid the problem of obtaining a warrant to examine credit card records and other financial information that is routinely available for commercial purposes but not available to police, police have simply recruited informants within credit checking firms.

Private investigating agencies were used to gather information that police, for lack of resources or because of legal constraints, could not obtain. With growing restrictions on what they may ask or find out about their employees, or their foes, private corporations increasingly have turned to private firms for information. In some cases, police themselves may be increasingly relying on private organizations to gather information and to create and store data bases, and developing their own private networks for the exchange of information. The extent and nature of these private operations, their relationship with police intelligence, and the broader implications of this practice are not well understood and merit further research.

Higher police officials may have inadvertently encouraged these practices by deliberate inattention to the operations of their own intelligence units; superiors did not always want to know exactly what was going on.

With the exception of the FOIA, the newer rules were discussed by our respondents in an unspecific and generic way. Only occasionally

[9] The Chicago Police Department declined our request for interviews because of a court order that required that the National Lawyers' Guild, the plaintiff in a legal action against the department, be informed of any outside contacts that the department had concerning intelligence matters. The department did not want to create a situation in which the guild would be approaching The Rand Corporation for access to this study while the legal action was still in progress. We did, however, interview officials in the U.S. and State Attorney's Offices.

was a specific piece of legislation, e.g., a liberal discovery law, cited. The bulk of the constraints seemed to derive less from legislation at the federal or state level than from "judge-made law"—new rules resulting from court decisions, and rules imposed neither by legislation nor by case law but by administrative policy and the interpretation of that policy.

In the eyes of police and prosecutors, the constraints are very much a matter of climate, atmosphere, and public attitude. This has resulted not only in increased restrictions on intelligence operations but in lack of community cooperation, increasing lawsuits, unfavorable court decisions, declining resources, unnecessary conservatism, loss of morale, and, ironically, the risk of further abuses.

The Case Sample

To examine how the perceptions of law-enforcement officials we interviewed compared with the facts in actual cases, we examined 51 cases in which politically inspired crimes were prevented or prosecuted, roughly half of which occurred under the older rules, and half under the newer rules, prior to the recent modification of the rules by the Reagan Administration. Although this sample is small, our respondents concurred that we had exhausted their memories of cases relevant to this inquiry.

The universe of cases that *could* have been examined is, in fact, quite small. Most observers regard the mid- to late 1960s as the beginning of the upsurge in political violence in the United States, although accurate statistics on politically inspired crime are not available for the period of our investigation (1965-1980). Neither the Department of Justice nor the FBI has records systems that provide automatic retrieval of politically motivated crimes. And data bases of terrorist events such as those maintained by the Central Intelligence Agency and The Rand Corporation deal only with incidents of international terrorism.

Risks International, Inc. (a private research firm located in Alexandria, Virginia) has probably the most complete chronology of incidents of U.S. domestic terrorism. This chronology lists 625 acts of terrorism between 1970 and 1980. On the basis of the Risks chronology and a review of newspapers of the late 1960s, we estimate that between 700 and 800 incidents of political violence occurred in the United States during the period covered by our study, but most of these cases could not be included in our sample, because they were never solved. Bombings, which are the principal form of terrorist ac-

tivity in the United States, comprise over 80 percent of the incidents in the Risks chronology; however, according to one FBI official, less than 5 percent of all bombings result in arrests. The record is better for politically motivated bombings, but according to Florida officials, only 16 of 59 bombings that occurred between 1974 and 1979 resulted in arrests. None of the members of the New World Liberation Front, a terrorist group responsible for nearly 100 bombings in the San Francisco Bay area, were ever identified or apprehended. Also, a single investigation or prosecution may represent several bombings; thus, the number of bombing *cases* is much smaller than the number of bombings. We estimate that fewer than one-quarter of the total number of bombing incidents resulted in completed cases that we might have studied.

Few terrorist homicides are ever solved; in contrast, most kidnappers in the United States are caught. This has little effect on our sample, however, because there has been only one known politically motivated kidnapping in the United States—the abduction of Patricia Hearst by members of the Symbionese Liberation Army. The perpetrators in that case were all either killed during a shootout with police in Los Angeles or apprehended and convicted. Politically inspired hijackers and those who take hostages in embassies and consulates often allow themselves to be surrounded by police. Eventually they are compelled to surrender to authorities, either here or abroad. But their apprehension does not involve intelligence operations. We estimate that only a few hundred cases of political violence involved intelligence operations during the entire period—possibly fewer than 200.

In identifying our case sample, we had to rely on interviewees' memories, refreshed sometimes with case materials (when available). Thus, our sample suffers from several types of bias and possible inaccuracies. Because no current FBI officials were among the interviewees, the sample is more heavily weighted toward cases investigated (partially or wholly) and prosecuted at the local level. Second, by the virtual exclusion of FBI cases in which terrorist incidents were *prevented,* the case sample is biased toward cases that reached prosecution. Third, the "older" portion of the sample excludes cases in which certain investigative techniques, such as illegal electronic surveillance, predominated. Clearly, such techniques cannot and would not be used under the newer intelligence rules.

Table 1 shows a cross-tabulation of the sample by time period and nature of the cases. We have defined four broad case categories: (1) bombing, explosives, weapons, and arson cases; (2) individual violent crimes such as murder, assault, robbery, and kidnapping; (3) charges

Table 1

CASE SAMPLE BY NATURE OF CASE AND ERA
(Entries are numbers of cases)

Nature of Case	Older Rules	Newer Rules	All Cases
Bombing, bombing conspiracy, explosives or weapons possession, arson	11	20	31
Murder, attempted murder, conspiracy to murder, assault, robbery, kidnapping, rape	7	6	13
Violent demonstrations and riots	3	2	5
Other (including cases in which prevention or deterrence of criminal acts was paramount)	2	—	2
Total	23	28	51

arising from violent demonstrations and riots; and (4) "other," including cases in which prevention or deterrence of criminal acts was paramount.

The cases examined involved a wide range of perpetrators. Table 2 is a cross-tabulation by time period and groups responsible for incidents. The largest single subcategory is Black activist groups, with 17 cases, followed by the Cuban anti-Castro groups, with 12 cases; together, these two groups represent almost 60 percent of the total sample. The two groups account for 18 cases under the older rules, or nearly 80 percent of that part of the sample. They account for 13 cases under the newer rules, or just over 40 percent of that part. The decline is the result of the decline in Black extremist activity.

The balance among the groups roughly matches the Risks International statistics. If we set aside bombings, Black extremist groups account for approximately one-third of the assassinations, robberies, thefts, and armed assaults. Black extremists are primarily shooters;

Table 2

CASE SAMPLE BY TERRORIST GROUP AND ERA
(Entries are numbers of cases)

Terrorist Groups	Older Rules	Newer Rules	All Cases
Indigenous radical left groups			
Black activist groups	12	5	17
Weather Underground	1	1	2
Brown Berets	—	1	1
Progressive Labor Party	—	2	2
Indigenous radical right groups			
Minutemen and other right-wing paramilitary	2	1	3
KKK	1	1	2
Nationalist/separatist			
FALN (Puerto Rico)	1	3	4
Cuban anti-Castro groups	4	8	12
Croatian/Serbian	—	3	3
Iranian students	1	—	1
Palestinian	1	—	1
Other			
JDL	—	3	3
Total	23	28	51

white revolutionaries are primarily bombers. The underrepresentation of bombing among the cases examined leads to the predominance of Black groups in the sample.

Despite the small size of the sample and the biases already mentioned, our 51 cases are fairly representative of the terrorist activity that occurred in the United States during the late 1960s and 1970s in terms of location, spectrum of terrorist activity, and kinds of groups responsible.

Analysis of the Cases

How Cases Actually Fared

As our interviews clearly indicate, most law-enforcement officials believe that the newer rules significantly reduced proactive measures

aimed at deterrence and prevention of violence. Such measures include recruiting and planting informants and inserting undercover police officers before criminal standards are met in initiating investigations. We tested this proposition in our case sample analysis by comparing the incidence and effects of preventive intelligence in terrorist-related cases during the older rules and newer rules eras.

The results of our analysis show that the rate of successful preventive intelligence applications has declined, resulting in a shift from proactive to reactive investigative work. Fifty-six percent (13 of 23) of the older rules cases involved preventive intelligence, often gathered by informants or undercover officers, whereas only 36 percent (10 of 28) of the newer rules cases involved such measures.

All 13 of the older rules cases that involved preventive intelligence techniques were successful preventions, but only eight of these were prosecution successes (three were prosecution failures, and in two, no attempt was made to prosecute, because there was evidence of investigative misconduct or illegal investigative acts by law-enforcement personnel). All but one of the ten newer rules cases were successful preventions, and nine of the 11 prosecutions were successful.

Table 3 summarizes the outcomes of all of the cases in each time period and identifies what each outcome hinged on. All cases are assigned to one of two major categories: those whose outcomes hinged on the use of investigative techniques or issues affected by the newer intelligence rules, and those whose outcomes did not. The latter category includes outcomes based on chance or on the use of conventional investigative techniques, such as the collection of crucial physical evidence (e.g., fingerprints) and visual identification of suspects or auto license plates by witnesses. The first category is further subdivided into cases whose outcomes are based mainly or largely on evidence gathered by undercover agents or informants and cases whose outcomes were largely influenced by evidence gathered by other techniques, such as wiretaps and other electronic surveillance.

Only four of the 21 prosecutions under the older rules (19 percent) were failures, and two of these were investigative successes but prosecution failures. (The high proportion of successes is not surprising, since we asked interviewees to focus on successful cases.) Eight of the 32 prosecutions under the newer rules (25 percent) were failures. (The greater number of prosecutions than cases in our sample is the result of prosecutions for a single act taking place in both federal and state courts.) In *both* eras, three-quarters of the prosecution failures were cases whose outcomes hinged mainly on evidence gathered by informants or undercover police agents.

Overall, the role played by investigative techniques affected by the newer intelligence rules did not change significantly over the two

Table 3

HOW PROSECUTIONS FARED UNDER OLDER AND NEWER INTELLIGENCE RULES

Case Category	Outcomes Under Older Rules		Outcomes Under Newer Rules	
	Failures	Successes	Failures	Successes
Outcomes based on investigative techniques affected by newer intelligence rules				
Outcomes based mainly on use of undercover agent and/or informant	3	10	6	14
Outcome based mainly on other investigative techniques	—	1	—	—
Outcomes based on chance or the use of investigative techniques not affected by newer intelligence rules	1	6	2	10
Totals	4	17	8	24

Note: The disparity in numbers between this table and the total number of cases in our sample (21 prosecutions under the older rules and 32 under the newer rules vs. 23 older rules cases and 28 newer rules cases) is explained by prosecutions for the same act in both federal and state courts.

time periods: 67 percent of the prosecution outcomes under the older rules (14 of 21) were based mainly on such techniques, compared with 62 percent (20 of 32) of the newer rules case outcomes; virtually all of these outcomes hinged on evidence provided by informants or undercover agents. Likewise, the success rate of cases in which undercover agents or informants played a crucial role did not change much between periods: 77 percent (10 of 13) in the older rules period, compared with 70 percent (14 of 20) in the newer rules period. All of this suggests that the rules themselves had little effect on prosecution outcomes and that investigators and prosecutors adapted fairly well to the newer rules.

How Cases Might Fare Under Opposite Rules

How would the prosecutions of older rules cases have fared under the newer rules? As would be expected, failures would remain fail-

ures and successes would remain successes in those cases whose outcomes did *not* hinge on investigative techniques affected by the newer rules. One case whose outcome depended importantly on evidence gathered by electronic surveillance techniques would remain a success, because the crucial wiretap information could have been obtained legally under the newer rules.

Three of the 11 successes that depended importantly on undercover or informant work plus a legal wiretap probably would have failed under the newer rules. The requirement of applying a criminal standard for initiating undercover or informant operations and the difficulty of shielding the identities of agents in the discovery process would probably have resulted in failures.

Of the remaining eight older rules successes, only three would certainly have been successes under the newer rules: In one case a legal wiretap could also have been obtained under the newer rules; the outcome of the second case hinged on information provided by FBI informants, who could also have been used under the newer rules; and in the third case, the placing of an informant, whose testimony really made the case, would have been allowed under the newer internal police department guidelines.

The fate of the remaining five older successes is uncertain. All hinged on information provided by informants or undercover agents. If these sources could have been used under the newer rules, the cases would remain successes. But because some of the newer police department internal guidelines are ambiguous, and because the basis on which an undercover agent or informant was inserted was not known to us, we cannot confidently judge whether some or all of these outcomes might have changed under the newer rules. We can only show the results of this portion of the analysis in terms of a *range* with upper and lower bounds: At one extreme, it is possible that only 3 of 11 successful prosecutions (27 percent) would remain successes; at the other extreme, 8 of 11 prosecutions (about 73 percent) might remain successes. Thus, between 27 and 73 percent of the older rules successes might have been failures under the newer rules.

How would the prosecutions of the newer rules cases have fared under the older rules? Again, as expected, failures would remain failures and successes would remain successes in those cases whose outcomes did *not* hinge on investigative techniques affected by the newer rules. Such cases comprised 37 percent of the sample (2 were prosecution failures and 10 were successes).

Six of the failures depended importantly on undercover or informant use; only two of these would clearly have also been failures under the older rules. One of these involved a 1969 crime and a 1979 trial whose outcome was unfavorably influenced by the shredding of police

intelligence files and a successful defense of discriminatory law enforcement, which had been given vitality under recent state case law. In a second case, a successful defense invoked recent state case law requiring dismissal because of a police agent's presence at privileged conversations between attorney and clients. A third case was dismissed because of law enforcement's reluctance to reveal the identities of undercover agents and informants under adverse court discovery decisions. All three of these cases probably would have been successes under the older rules.

The fourth failure was due to a flawed search warrant and an undercover operation that violated the First Amendment, according to the trial court. Except for the flawed search warrant, this case might have succeeded under the older standards for initiating undercover operations. Thus, two-thirds of the newer rules failures involving undercover or informant operations might have been successes under the more relaxed older rules.

As expected, the 14 newer rules successes that depended heavily on informant or undercover operations would also have been successes under the older rules. But there is an interesting side note to one of these cases: The case occurred in 1977 under the newer rules. But the police maintain that their newer (more recent) guidelines would have prohibited them from collecting information from which they constructed and maintained a file of persons suspected of having some involvement with the terrorist group involved, and this file was crucial to the identification of the defendant.

Comparing the Projections Under Opposite Rules

All of the cases whose outcomes were based on chance or investigative techniques not affected by the newer intelligence rules would, by definition, have the same outcomes under the opposite rules. In both eras, roughly the same proportion of cases are in this category (33 percent of older rules prosecutions, and 37 percent of newer rules prosecutions).

For cases whose outcomes hinged on investigative techniques affected by the newer intelligence rules, the projected outcomes under the opposite rules showed a different pattern from era to era. All of the original failures under the older rules would remain failures under the newer rules, but only one-third (2 of 6) of the failures under the newer rules might have been failures under the more relaxed older rules.

Depending on how one categorizes two cases that were investigative successes but prosecutorial failures, 25 or 30 percent of the older

rules successes involving informant or undercover operations might have been failures under the newer rules. Of the remaining seven older rules successes that might have remained successes under the newer rules, five are uncertain in that their outcomes would have remained unchanged *only* if it were possible to proceed with the same informant or undercover operations under the newer rules. Otherwise, 75 to 80 percent could have been failures.

Conclusions

Although we were able to examine only 51 relevant cases (which eventuated in 53 prosecutions and two "no prosecutions"), not all of which involved intelligence operations, we were able to draw some important conclusions. These conclusions apply only to the period 1964-1980; they do not reflect the impacts of the intelligence rules of the 1980s.

First, it appears that intelligence operations are more important than other investigative techniques such as gathering physical evidence or seeking eyewitness identification of suspects in terrorist-related cases. Well over 60 percent of the cases in our data base involved intelligence operations.

Second, the impacts of the newer rules seem to have largely affected the timing and availability of preventive intelligence, a finding that is consistent with the perceptions of investigators and prosecutors we interviewed. Preventive intelligence is gathered mainly by informants and undercover police, although electronic surveillance also plays a role. Although the proportion of cases in which such techniques were used is roughly the same in the older and newer rules periods, the proportion of cases in which violence or other crimes were *prevented* declined under the newer rules.

The law-enforcement officials we interviewed asserted that the newer rules reduced the acquisition of advance knowledge of crimes about to be committed, so that operations to prevent them from being carried out—operations sometimes as simple as letting the conspirators know that police are aware of their plans—likewise decreased. Under the newer rules, intelligence became more reactive, supporting apprehension and prosecution, not prevention. Investigators had to apply criminal standards (i.e., they had to have evidence of the commission of a crime or the imminent commission of one, which is difficult to prove) for emplacement of informants or undercover agents within terrorist groups. Although our interviewees were able to cite newer rules cases illustrating prevention, the total effect of the shift

from preventive intelligence to reactive intelligence cannot be measured. We have no way of knowing how many groups were deterred; how many terrorist operations were aborted; how many bombings, murders, or violent demonstrations were prevented; or how much more political violence would have occurred. Our respondents asserted that intelligence operations were always very difficult, even under the older, more permissive rules and that, in fact, most terrorist crimes remain unsolved.

Finally, it appears that investigative and prosecutorial law-enforcement entities adapted successfully to the newer rules, as evidenced by the fact that the rate of criminal conviction did not change appreciably over the two time periods.

Projection of outcomes of prosecutions under the opposite rules—certainly a more speculative kind of analysis—produces a somewhat different result. Most of the prosecution failures under the more stringent newer intelligence rules might have been successes under the more relaxed older rules. And many, if not most, of the prosecution successes under the older intelligence rules might have been failures under the newer rules. The precise proportion of older rules successes that might have been newer rules failures depends on whether the timing and nature of informant or undercover operations could have been the same in both eras. Clearly, such speculative statistics should be accorded less weight than the actual outcome statistics.

Terrorist activity did not increase with the implementation of the newer rules; it did not even continue at the same level as in the late 1960s and early 1970s. Terrorist activity in the United States declined in the late 1970s, probably for reasons that had nothing to do with intelligence operations. Some of the previously active groups had been destroyed, and, perhaps more important, some of the causes that inspired political violence—notably, American involvement in the war in Vietnam—no longer existed.

The political turmoil of the 1960s and early 1970s demanded an expansion of domestic intelligence activities. The decline in political violence after that time permitted the reduction of such activities. Had the country faced a growing terrorist threat, some of the newer rules might never have been imposed, or if they had been, their effect might have been reduced. But an angry public, outraged by abuses in areas other than the prevention of terrorism, demanded tighter controls on all intelligence operations. Had the public felt threatened and in need of protection against terrorism, increased constraints on domestic intelligence would probably not have been tolerated.

RAND/R-2939-DOJ